

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

KENNETH HERRERA, *et al.*,

Plaintiffs,

vs.

Civ. No. 03-120 MV/LAM

PHILLIP MORRIS, INC., *et al.*,

Defendants.

**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** comes before the Court on Defendant Wabash's Motion to Vacate Order, filed January 20, 2004, [Doc. No. 151]. The Court, having considered the motion, briefs, relevant law and being otherwise fully informed, finds that the motion is well-taken and will be **GRANTED**.

**FACTUAL BACKGROUND**

On January 2, 2004, Plaintiffs filed an unopposed motion requesting an order setting mediation with all non-opposed parties on January 28, 29, and 30, 2004. Plaintiffs' motion identified Defendant Werner Enterprises, Inc., and Defendant James L Bunner as opposed parties excluded from the motion. On January 6, 2004, the Court ordered all parties except Defendant Werner Enterprises, Inc., and Defendant James L. Bunner to attend mediation in this matter on January 28, 29, and 30, 2004. Defendant Wabash National Corporation ("Wabash") subsequently filed the instant motion stating that it had never agreed to participate in the proposed mediation and requesting to be excused from the obligations of the January 6, 2004 Order.

Plaintiffs filed a response requesting that the matter remain scheduled for mediation on January 28, 29, and 30, or, in the alternative, that a court-ordered settlement conference be held on those same dates. Plaintiffs' response does not indicate whether Plaintiffs want the scheduled mediation to proceed without the participation of Wabash.

The Court finds that Wabash has demonstrated that it did not consent to the proposed mediation and should have been excluded from the January 6, 2004 Order as an opposed party. Pursuant to Fed. R. Civ. P. 60(b), the Court will relieve Wabash of the obligations imposed by the January 6, 2004 Order. As no party has indicated otherwise, the Court will assume that the non-opposed parties wish to continue with the scheduled mediation.

#### **CONCLUSION**

**IT IS THEREFORE ORDERED** that Defendant Wabash's Motion to Vacate Order, filed January 20, 2004, [Doc. No. 151] is **GRANTED**. Defendant Wabash is hereby excused from the obligations of the Court's January 6, 2004 Order regarding mediation of this matter on January 28, 29, and 30, 2004.

Dated this 27th day of January, 2004.



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MARTHA VÁZQUEZ  
U. S. DISTRICT COURT JUDGE